



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OMOLO, WAKI & VISRAM, JJ.A)**

**CIVIL APPLICATION NO. NAI. 111 OF 2011**

**BETWEEN**

**SIMBA COLT MOTORS LIMITED.....APPLICANT**

**AND**

**JAMES GITAH MWANGI.....RESPONDENT**

***(Being An application for stay of execution pending the lodging, hearing and determination of an intended appeal for the Award and Decree of the Industrial Court at Nairobi (Mukunya, Udoto & Alumande, JJ.) dated 1<sup>st</sup> February, 2011***

**in**

**IND. COURT CAUSE NO. 448 (N) OF 2009)**

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**RULING OF THE COURT**

By their motion dated and filed on 9<sup>th</sup> May, 2011, *M/s Simba Colt Motors Ltd.* (“*Simba*” or “*the applicant*” ) seek one substantive order under *rule 5 (2) (b)* of the Court’s rules, after abandoning another prayer for stay of proceedings. The order sought is as follows:

***“2 Pending the lodging, hearing an determination of an intended appeal from the Award and Decree of the Industrial Court delivered on the 1<sup>st</sup> day of February, 2011, this Honourable Court be pleased to grant a stay of execution of the said Award and Decree.”***

It also seeks costs of the application.

The Award and Decree of the Industrial Court which is intended to be challenged, arose from a claim laid before the Industrial Court by *James Gitahi Mwangi* (“*Mwangi*” or “*the respondent*”) for recovery of Shs.126,687,978 from Simba. It was common ground that Mwangi was employed by Simba as a fleet/Government Sales Manager between July, 2000 and May, 2009 when he tendered his resignation. It is also common ground that Mwangi was entitled to a monthly salary as well as commission on sales. In his “Memorandum of Claim”, he asserted that he had not been paid special incentive commission on sales between July, 2001 and May, 2009, salary for the month of May, 2009, leave accrued for 92 days, fleet incentive commission from May 2002 to June 2008, standard commission for May 2009 and expenses for

bull bars, all totaling Shs.126,687,978/=. Simba denied that claim and specifically pleaded that it had paid all the commissions and salary to Mwangi before he resigned in an irregular manner without paying one months' salary in lieu of notice which it counterclaimed. It also contended that all claims predating 17<sup>th</sup> August, 2006 were time-barred in law and were not recoverable.

The Industrial Court heard the matter after a failed attempt to refer it to arbitration by the labour officer, and in the end agreed with Simba that the claims predating 17<sup>th</sup> August, 2006 were time barred and also upheld Simba's counter-claim for one months' salary in lieu of notice. The court, however, found that it was Simba's duty, since it had custody of the employment records, to prove that Mwangi's claim was not valid but they had failed to do so. In the end, the court delivered itself thus:

***“The court holds that the claimant is entitled to payment of his claim between 16<sup>th</sup> August, 2006 and May 2009. The Respondent is hereby ordered to calculate and pay the commission claimed by the Claimant for the period between 16<sup>th</sup> August 2006 and May 2009 as made, as the Respondent who has duty to maintain employment records under Section 74 of the Employment Act has failed to show the sales made by the Claimant. The Respondent also to pay the other claims made in the memorandum less Kshs. 110,000/= being one month's salary in lieu of notice, payment is to be made within thirty (30) days.***

***The claim for costs is hereby rejected and dismissed as the Claimant failed to present a complaint to the labour officer as provided in Section 47 of the Employment Act.***

***Judgment is hereby entered in favour of the Claimant and for Respondent in terms of the foregoing orders. In default of payment the Claimant to be at liberty to execute the Judgment as decree of the court.”***

That Award was made on 1<sup>st</sup> February, 2001. Simba was aggrieved by it and filed and served Notice of Appeal timeously. It also applied for copies of proceedings and the Award for appeal purposes. In the meantime, by 7<sup>th</sup> February 2011, Mwangi had, through his Advocates on record M/s Wamaasa & Co., made calculations of the amounts payable to him in excess of Shs.69 million and submitted them to Simba's Advocates M/s Mohamed Muigai & Co. Simba's Advocates responded that there was no basis for such figures since the Award required that the calculations be made by Simba and they promised to do so. Their computation came to Shs.6,433,920/= which they offered to Mwangi in full and final settlement of the matter. Mwangi rejected the offer, thereby precipitating a stalemate and Simba deposited the amount with the Industrial Court. Mwangi on his part proceeded to extract a decree and on the basis of his own calculations sought to execute it to recover the principal sum of Shs.58,461,067/= together with interest thereon Shs.11,628,146/=:, and auctioneers' charges of Shs.1.6 million. On 6<sup>th</sup> May 2011, the auctioneers descended on the showrooms of Simba and attached several vehicles which were still *in situ* when the Industrial Court issued temporary orders for stay and the High Court issued another order for stay in an application for Judicial Review challenging the process of execution of the decree. Simba further sought a certificate of urgency to fast track the Motion now before us, which was granted on 3<sup>rd</sup> June 2011 after hearing both sides.

That is the background to the Motion. As usual, it will be granted in exercise of the court's discretion if the applicant is able to show, not only that the intended appeal is not frivolous or is arguable, but also that if the order sought is not granted, the success of the intended appeal will be rendered nugatory. The court is also obligated by statute to consider and apply the overriding objective of civil litigation, that is to say, to facilitate the just, expeditious, proportionate and affordable resolution of the appeal – **Section 3A** and **3B** of the Appellant Jurisdiction Act.

In his attempt to surmount the first hurdle, learned counsel for Simba, Mr. Oraro who led Mr. Nyaoga in the application, referred us to the Affidavit in support and a draft Memorandum of Appeal both of which raise issues of fact and law. He submitted in particular that the Industrial Court shirked its adjudicative duty by failing to determine the dispute before it with finality and instead referring it back to the applicant. In his view, it was arguable whether there can be a valid award if the issues before the court

were not determined by the court. It will also be argued that the purported decree extracted on the basis of an award which was a nullity and which the Industrial Court itself had no hand in determining, was capable of execution. As it is, he submitted, there was a “decree” in existence whose execution will certainly proceed unless stay is granted. On the nugatory aspect, Mr. Oraro submitted that the award in issue was colossal at Shs.70 million whose recovery from the applicant was unlikely and would lead to grave consequences, thus rendering the success of the appeal nugatory.

In opposing the application, learned counsel for the respondent Mr. Wamaasa submitted that the application was an afterthought because the parties had already returned to the Industrial Court in respect of the decree and the applicant was ordered to verify the figures submitted by the respondent in the decree. Instead of doing so, they came not only before this court, but also went to the High Court where they took out Judicial Review proceedings on the same matters. All this, in his submissions, was abuse of the court process and the applicant ought not to be heard in the first place. Mr. Wamaasa further submitted that there was no issue of law at all which is capable of argument before this court since the only issue between the parties is on figures which only the Industrial Court can determine. At any rate, even if there was an arguable issue, refusal to grant stay would not render the result of the intended appeal nugatory since this was a monetary decree which, the respondent has sworn, is capable of reimbursing in the unlikely event that the applicant succeeded on appeal. The money was also in relation to his employment and livelihood and it would be criminal to deprive him of that right.

We have given anxious consideration to the application and we are in no doubt that the intended appeal is not frivolous. The order of the court reproduced above clearly shows that it was not final until some event occurred. That event itself is blurred in controversy and there is nothing on record to show that the matter went back to the Industrial Court for further orders before the decree was drawn up. The only reference made relates to a Registrar but it is arguable whether that officer can make valid and enforceable orders on behalf of the court without any specific direction from the court itself. That would expose the decree and the contents thereof to further argument and scrutiny. As we have said, the intended appeal is arguable.

Is the second hurdle surmounted? We think it is, considering that a proclamation has already been made to recover in excess of Shs.70 million from the applicant. That is by any means substantial and we find no solid evidence beyond stating so in his Affidavit, that the respondent is capable of reimbursing it. As this court held in ***Reliance Bank Ltd.***

***-vs- Norlake Investments Ltd.*** thus:

***“In determining the second limb of the test, the court in Oraro and Rachier Advocates v Co-operative Bank of Kenya Limited (supra) had not been enunciating a third principle but merely stating that, in making its decision, it was bound to consider the conflicting claims of both sides. Where a decree for the payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory. The factors that could render the success of an appeal nugatory thus had to be considered within the circumstances of each particular case (Oraro and Rachier Advocates -vs- Co-operative Bank of Kenya (supra) explained and followed). Rule 5 (2) (b) conferred on the court original jurisdiction based on the exercise of discretion by the judges of the court. In the exercise of that discretion, certain principles had been developed to guide the court, the scope of which took account of evolving circumstances as they arose in various cases. In this instance, the circumstances showed that it would be too onerous to require the liquidator of the Applicant to deposit the money in court. A refusal to grant a stay would cause the Applicant such hardship as would be out of proportion to any suffering the Respondent might undergo while awaiting the hearing and determination Applicant’s appeal.”***

In balancing the inconvenience which both parties will suffer, we think in this case it falls on the applicants’ side who may well be rendered insolvent.

The upshot is that the Motion succeeds as prayed in prayer No. 2 thereof. The costs of the application

shall be in the intended appeal.

*Dated and delivered at Nairobi this 27<sup>th</sup> day of January, 2012.*

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

*I certify that this is a  
true copy of the original.*

**DEPUTY REGISTRAR**